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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Competitive Telecommunications Association,
Florida Competitive Carriers Association, and
Southeastern Competitive Carriers Association

CC Docket No. 98-39

Petition Regarding Regulatory
Treatment of Affiliates of ILECs

COMMENTS OF e.spire COMMUNICATIONS, INC.

e.spire Communications, Inc. ("e.spire"),¹ by its attorneys and pursuant to the Commission's Public Notice, DA 98-627, released April 1, 1998, submits these comments on the Petition of the Competitive Telecommunications Association ("CompTel"), et al.

Introduction and Summary

e.spire agrees in principle with the CompTel Petition. However, e.spire believes that the Petition does not go far enough. The Commission must not allow incumbent local exchange carriers ("ILECs") to circumvent their Section 251 and 252 obligations by establishing in-region affiliate alter egos that masquerade as competitive local exchange carriers ("CLECs"), *regardless of whether or not these affiliates use the same or similar names and logos as their ILEC siblings and corporate parents.*

BellSouth and other ILECs already are using similarly named affiliates, such as BellSouth BSE, to skirt the Commission's ruling that customer specific arrangements ("CSAs") must be offered to CLECs at an avoided cost discount.² Upping the ante, several ILECs have proposed to

¹ e.spire formerly was known as American Communications Services, Inc. or "ACSI".

² *CompTel Petition* at 7.

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move (or already have moved) data switches and other unbundled network elements (“UNEs”) associated with the provisioning of broadband “Section 706 services” to such affiliates.³ Selected interstate special access facilities could be next. If permitted, ILECs will use “CLEC” alter egos to remove entire business segments and service offerings outside the scope of Sections 251 and 252, and to skirt dominant carrier regulation.

Section 251(h) is clear. ILEC affiliates such as BellSouth BSE are “successors or assigns” of their ILEC siblings or parents. ILEC affiliates such as BellSouth BSE *also* are “comparable carriers” that meet the criteria for treatment as incumbents. Accordingly, the Commission should not hesitate to take advantage of this opportunity to reject the ILECs’ use of CLEC alter egos to avoid their interconnection, unbundling, resale and dominant carrier obligations. Any delay only would encourage ILEC efforts to circumvent their obligations under the Act and, thus, would be flatly inconsistent with the Commission’s mandate to do all that it can to open local markets to competition.

I. SECTION 251(h) PREVENTS ILECs FROM USING AFFILIATES TO AVOID INTERCONNECTION, UNBUNDLING AND RESALE REQUIREMENTS

Section 251(h) evinces a clear intent by Congress to foreclose the possibility of ILEC legal and regulatory maneuvering around the obligations imposed by Sections 251 and 252. Section 251(h)(1)(B)(ii) carefully defines the term ILEC to include an ILEC “successor or assign”. Thus, ILEC affiliates such as BellSouth BSE are ILECs by definition. To guard against unforeseen, but obviously not unanticipated, ILEC attempts at evading the statutory requirements of incumbency,

³ See, e.g., *Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability*, CC Docket No. 98-32 (filed Mar. 5, 1998) (e.spire filed a Consolidated Opposition to Ameritech’s Petition and the Section 706 Petitions of Bell Atlantic, CC Docket No. 98-11, and U S West, CC Docket No. 98-26, on Apr. 6, 1998).

Congress also provided, in Section 251(h)(2), that the Commission may, by rule, provide for the treatment of “comparable carriers” as incumbents. ILEC affiliates such as BellSouth BSE clearly meet the three-prong “comparable carrier” test for treatment as incumbents. In short, Congress built a fence that is “hog tight, horse high, and bull strong” in preventing an ILEC’s use of a CLEC affiliate to circumvent obligations imposed as a result of its incumbent and dominant status. The Commission should condemn this latest ILEC end run around the Act’s interconnection, unbundling and resale requirements. It is not too late to “nip it in the bud”.

A. Section 251(h)(1) Defines “ILEC” In A Way That Encompasses ILEC Affiliates Such As BellSouth BSE

The Commission should issue a declaratory ruling confirming that an ILEC affiliate that receives or utilizes ILEC resources for the provision of in-territory services that otherwise would be subject to Section 251(c) is a “successor or assign” under Section 251(h)(1). By including an ILEC “successor or assign” in the definition of ILEC, Congress sought to ensure that the obligations of incumbency attach to control over former local exchange monopoly operations and not to corporate form. In short, ILEC status conveys with the in-territory transfer of *any* of the facilities, financial and human capital, customers and business goodwill that are vestiges of the local service monopolies eradicated by the 1996 Act.

Indeed, e.spire supports CompTel’s position that BellSouth BSE and similar ILEC affiliates are “successors” and “assigns” of their ILEC siblings or parents. In particular, e.spire agrees that, under Section 251(h)(1), BellSouth BSE is a “successor” and an “assign” of BellSouth Telecommunications because BellSouth BSE uses resources transferred to it from BellSouth Telecommunications (brand name, financial resources, and/or human capital) to provide telephone

exchange service to customers in BellSouth Telecommunications' local service area.⁴ As CompTel set forth in its Petition, a Commission finding that BellSouth BSE is a "successor or assign" of its ILEC sibling or parent would be consistent with both the way these terms have been interpreted in corporate law and the Commission's *Non-Accounting Safeguards Order*.⁵ Moreover, e.spire also supports CompTel's position that BellSouth BSE and similar ILEC affiliates "should be treated as dominant carriers with respect to interstate access service and any other jurisdictionally interstate services that they provide."⁶ Because ILEC affiliates such as BellSouth BSE provide the same *local* services as their ILEC siblings or parents, the Commission should not extend nondominant treatment to these affiliates as it did for the ILECs' stand-alone, in-region interstate *long distance* affiliates.⁷

However, e.spire believes that, by placing unwarranted emphasis on an ILEC affiliate's use of its parent or sibling's name, the CompTel Petition does not go far enough. Surely, in the case of BellSouth BSE, use of the familiar Bell logo and BellSouth name are vestiges of incumbency that have been transferred from an ILEC to bestow a competitive advantage on its own affiliate.⁸ However, you can be sure that those customers transferred from BellSouth Telecommunications (the original BellSouth ILEC) and now benefiting from off-tariff CSAs would take that deal even if BellSouth BSE dropped the familiar name and logo. With or without the same or a similar

⁴ *CompTel Petition* at 9.

⁵ *Id.* at 9-11.

⁶ *Id.* at 12.

⁷ *Id.* at 12-13.

⁸ e.spire submits that Commission can correct the anticompetitive effect of BellSouth BSE's use of the BellSouth name and logo by requiring that BellSouth BSE properly compensate BellSouth for use of the BellSouth brand name and marks (ostensibly, that compensation should resemble the amount of BellSouth's avoided cost discount).

name, BellSouth's affiliate benefits uniquely from having been assigned some of the vestiges and competitive advantages of BellSouth's incumbency. By virtue of this fact, BellSouth BSE meets the statutory definition of an ILEC.

Indeed, the definition set forth in Section 251(h)(1) does not turn on an affiliate's use of its ILEC sibling or parent's name. Accordingly, the Commission should be sure not to make an affiliate's use of the ILEC name dispositive in determining whether that affiliate is an ILEC. Such a ruling merely would invite the ILECs to engage in a corporate name game with the same transparently anticompetitive ends. BellSouth BSE's use of the BellSouth name is merely one of many indicia that BellSouth BSE is an ILEC under Section 251(h)(1). In addition to the benefits that derive from the business good will and marketing efforts associated with the BellSouth name, *each* of the following factors indicates that BellSouth BSE is a successor and assign of BellSouth:

- (1) BellSouth BSE is capitalized, funded and owned entirely by BellSouth Corporation (the BellSouth holding company that also owns BellSouth Telecommunications);
- (2) BellSouth BSE is managed by high-level employees transferred from BellSouth Telecommunications; and
- (3) BellSouth benefits from the transfer to BellSouth BSE of customers and CSAs formerly held captive by BellSouth Telecommunications.⁹

Thus, to avoid elevating corporate form over statutory substance, the Commission should make clear that any time an ILEC transfers *any* of its resources to an in-territory CLEC affiliate, that affiliate, regardless of its state-commission-granted CLEC status, will be required to meet the Act's interconnection, unbundling and resale requirements for incumbents. The Commission also should make clear that such an ILEC affiliate does *not* qualify to purchase local exchange services

⁹ *CompTel Petition* at 5.

from the ILEC itself at wholesale rates, since the enterprise taken as a whole does not realize any avoided costs. Any other reading of the statute would be an invitation to ILECs to begin partitioning themselves in an effort to escape from and undermine the local competition provisions of Sections 251 and 252.

As noted above, BellSouth already is using its BellSouth BSE alter ego to evade the Commission's requirement that CSAs be offered for resale at an avoided cost discount. BellSouth, through its affiliate, also seeks to avoid dominant carrier tariffing requirements. This gives it flexibility to discriminate by offering off-tariff discounts on accounts subject to competitive pressure. As Mr. Joseph Gillan pointed out in his Florida Public Service Commission testimony, if left unchecked, this practice effectively will retard resale as an entry strategy.¹⁰

Significantly, the danger posed by ILECs' use of affiliates to avoid the obligations of Sections 251 and 252 also threatens facilities-based competitive entry. If successful in their efforts to protect high-end business accounts by moving them to so called CLEC affiliates, BellSouth and other ILECs likely will seek to push the envelope further by transferring facilities, customers and entire lines of business to their lightly regulated affiliates. The most obvious candidates for such transfers are those facilities used in the access and data markets which are typically most profitable for ILECs and in which they are beginning to face competitive pressure.

This is not a theoretical or speculative problem. Ameritech already has transferred critical local network data facilities to a so called "data affiliate" in an apparent attempt to avoid Section 251(c) interconnection, unbundling and resale obligations. In most instances, Ameritech has refused to provide local frame relay data interconnection to CLECs on the ground that the facilities

¹⁰ *Direct Testimony of Joseph Gillan Before the Florida Public Service Commission* at 10-12 ("Gillan Testimony") (appended to the CompTel Petition).

had been transferred to an unregulated affiliate. Ameritech held fast to this strategy until a state commission administrative law judge issued an adverse opinion in an arbitration proceeding. Thereafter, Ameritech agreed to limited local data interconnection, but its strategy to use unregulated affiliates to avoid ILEC interconnection obligations likely will resurface if the Commission fails take appropriate action on CompTel's Petition.

Indeed, the BellSouth BSE and Ameritech affiliate experiments merely represent the "camel's nose under the tent". If the Commission does not affirmatively reject ILEC attempts to use affiliates to skirt the statutory obligations of incumbency, other ILECs will be emboldened to seek to avoid interconnection, unbundling and resale requirements for CSAs and for broadband and packet-switched "Section 706 services" by transferring CSAs, data switches and customers to CLEC affiliates. Similarly, ILECs seeking to avoid dominant carrier tariffing requirements for interstate access services might be emboldened to move selected special access facilities to their lightly regulated "CLEC" alter egos. As a result, ILEC affiliates could offer discriminatory off-tariff deals to special customers, including Section 272 affiliates.

In each of these cases, e.spire believes that the affiliate would assume ILEC status because its ILEC sibling or parent transferred some of the vestiges and competitive advantages of incumbency to it.¹¹ Since such affiliates are, by definition, ILECs, the Commission should quash this latest threat to competitive local entry by making clear that these ILEC alter egos are subject to the Act's interconnection, unbundling and resale requirements, and to regulation as dominant carriers.

¹¹ The same logic would apply if, for example, an ILEC merely partitioned a switch and gave control over part of that facility to an affiliate.

B. Section 251(h)(2) Requires That ILEC Affiliates Such As BellSouth BSE Be Treated As Incumbents

If the Commission were to decline to issue a declaratory ruling based on the definition of an “incumbent local exchange carrier” supplied by Congress in Section 251(h)(1), it should simultaneously initiate a rulemaking to clarify the criteria under which an ILEC affiliate will be considered a “comparable carrier” that warrants treatment as an ILEC under Section 251(h)(2). e.spire endorses CompTel’s proposal that the Commission adopt a rule that makes clear that an ILEC affiliate will be found to be a “comparable carrier” and will be treated as an ILEC “if it provides local service in the same geographic area as the ILEC and if the ILEC has transferred anything of value, including [facilities,] brand names, financial resources, or human capital, to the affiliate.”¹²

Section 251(h)(2) specifically authorizes the Commission to adopt such a rule if the three part test set forth in that section is met. Importantly, e.spire believes that an ILEC affiliate’s use of the ILEC brand name and logo is not required to satisfy any prong of the “comparable carrier” test.

Under the first prong of this test, the Commission must find that a local exchange carrier *occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by an ILEC*. As discussed at length in the previous section of these comments, e.spire believes that ILEC affiliates, such as BellSouth BSE, that receive or utilize ILEC resources for the provision of in-territory services that otherwise would be subject to Section 251(c) are, by definition, ILECs. Thus, it is clear that such affiliates occupy a “position in the market for telephone exchange service within an area that is comparable” to that occupied by its ILEC sibling or parent.

¹² *CompTel Petition* at 13.

The second prong of the test requires that the Commission find that such a local exchange carrier has “*substantially replaced*” an ILEC. Again, in the case of ILEC affiliates, such as BellSouth BSE, ILECs have “substantially replaced” themselves with “CLEC” alter egos. They have done this by transferring customers, assets, employees and portions of their business to their newly formed affiliates. In BellSouth’s case, BellSouth Telecommunications CSAs have been replaced by BellSouth BSE CSAs. Any time an ILEC transfers customers or facilities to such an affiliate, it “substantially replace[s]” itself as the incumbent provider of all services associated with those customers and facilities.

Under the third and final prong of the “comparable carrier” test, the Commission must find that treatment of such a local exchange carrier as an ILEC is *consistent with the public interest, convenience and necessity and the purposes of Section 251*. As has been discussed throughout these comments, ILECs have created CLEC affiliates for virtually no other purpose than to circumvent the interconnection, unbundling and resale provisions of Section 251(c). Otherwise, as Mr. Gillan asks in his testimony, why would it suddenly take more than one BellSouth to provide local service in its own territory?¹³ If allowed to continue with this sham, the congressional goal underlying Section 251 – the opening of local markets to competition – will be compromised severely. ILECs will be able to protect their monopoly control over local markets by refusing to resell CSAs, by denying their competitors interconnection to and unbundling of data facilities, and by engaging in discriminatory and predatory off-tariff pricing. However, Congress already has decided that the perpetuation of ILEC monopolies is not in the public interest. Thus, it is abundantly clear that the public interest and Section 251 require that the Commission treat the

¹³ See Gillan Testimony at 2 and 17.

ILEC affiliates discussed herein as ILECs and dominant carriers.

In sum, e.spire submits that ILEC affiliates such as BellSouth BSE are in fact local exchange carriers that are “comparable carriers” that warrant treatment as ILECs. Because a single one of these ILEC affiliates – BellSouth BSE – already controls hundreds of thousands of access lines, e.spire requests that the Commission, if it avails itself of this alternative, conduct such a rulemaking on an expedited basis.

Conclusion

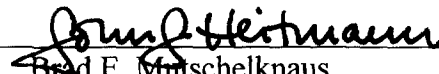
For all the foregoing reasons, e.spire requests that the Commission issue a declaratory ruling confirming that an ILEC affiliate that receives or utilizes ILEC resources for the provision of in-territory services that otherwise would be subject to Section 251(c) is itself, by definition, an ILEC. Alternatively, e.spire requests that the Commission initiate a rulemaking in which it can adopt a rule that makes clear that such an ILEC affiliate will be found to be a “comparable carrier” and, accordingly, will be treated as an ILEC.

Respectfully submitted,

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